

The ALJ awarded claimant a 13 percent permanent partial general disability based on the permanent functional impairment rating opinion of Dr. Lynn Curtis. The ALJ found claimant's permanent injury was limited to his cervical spine and, therefore, subtracted that portion of Dr. Curtis' total 17 percent rating that was attributable to claimant's lumbar spine.

On appeal, respondent contends that claimant's permanent partial general disability award should be based on the five percent whole body functional impairment rating of Dr. Sergio Delgado. Respondent further contends that between 50 and 100 percent of this impairment preexisted claimant's June 11, 2001 work-related accident. Respondent agrees with the ALJ's determination that claimant's permanent impairment is limited to his neck.

Conversely, claimant requests the Board affirm the ALJ's Award as to the cervical spine impairment, but claimant argues he also proved permanent injury to his low back. Accordingly, Dr. Curtis' five percent rating to the lumbar spine should be included with his thirteen percent rating to the cervical spine for a combined 17 percent impairment to the body as a whole.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, and considering the arguments contained in the parties' briefs, the Board finds the Award should be modified to a 2.5 percent permanent partial disability.

Respondent argues one of the reasons the Board should disregard Dr. Curtis' rating is because it was given before claimant had reached maximum medical improvement and therefore the rating does not comport with the *AMA Guides*¹ as required by statute.² The Board agrees. When Dr. Curtis examined claimant and issued his functional impairment rating claimant had not yet reached maximum medical improvement. In addition, the absence of low back complaints in the medical records after June 13, 2001, make it unlikely that claimant suffered permanent impairment to his lumbar spine as a result of the June 11, 2001 accident.

The record reflects that following Dr. Curtis' January 8, 2002 examination of claimant, claimant was then seen by Dr. Delgado on June 12, 2002, who found claimant was not at maximum medical improvement. Claimant thereafter received further treatment including epidural injections.

Dr. Delgado saw claimant again on February 25, 2003. After examining claimant and determining claimant had met maximum medical improvement, Dr. Delgado rated claimant's impairment as five percent to the cervical spine, 50 percent of which he said

¹American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² See K.S.A. 44-510e(a).

preexisted the June 11, 2001 work-related accident, leaving a net increase of two and a half percent.³

The Board finds that at the time Dr. Curtis saw claimant he was not at maximum medical improvement. This is evidenced both by Dr. Delgado's opinion that claimant was in need of further treatment and the fact that claimant did receive additional treatment, including epidural injections by Dr. Nicolae, after Dr. Curtis had examined and rated him. Furthermore, Dr. Curtis agreed that if claimant received additional treatment and his range of motion improved then claimant would need to be re-rated. Dr. Delgado did indeed find that claimant's range of motion had improved in February 2003.

Accordingly, the Board concludes Dr. Delgado's 2.5 percent functional impairment rating best represents the percentage of permanent impairment that resulted from claimant's work-related injuries.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Administrative Law Judge Brad E. Avery's Award should be, and the same is hereby modified as follows:

Wherefore, an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Fred N. Stone, and against the respondent City of Topeka, for an injury which occurred June 11, 2001, and based upon an average weekly wage of \$656.00 claimant is entitled to 10.375 weeks of permanent partial disability compensation in the sum of \$401 per week or \$4,160.38 for a 2.5 percent functional impairment all of which is currently due and is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

³ See K.S.A. 44-501(c).

Dated this _____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
 Larry G. Karns, Attorney for Respondent
 Brad E. Avery, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director